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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY
a Delaware Corporation

Petitioner,

v.

JAMES M. JOHNSON and FRANCIS L. JOHNSON, as Representatives of the ESTATE OF JEREMY MICHAEL JOHNSON, Deceased,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

---

PETITION FOR WRIT OF CERTIORARI

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33pp

Does the Federal Railroad Safety Act preempt all municipal ordinances which purport to govern the speed of trains through towns and cities in the United States?

RULE 29.6 LISTING

Petitioner Missouri Pacific Railroad Company (MPRR) is a wholly owned subsidiary of Missouri Pacific Corp. (MPC). Missouri Pacific Corp.(MPC) is a wholly owned subsidiary of Union Pacific Holdings Corporation (UPHC). Union Pacific Holdings Corporation (UPHC) is a wholly owned subsidiary of Union Pacific Corporation (UPC).

Petitioner Union Pacific Railroad Company (UPRR) is a wholly owned subsidiary of Union Pacific Holdings Corporation (UPHC). Union Pacific Holdings Corporation (UPHC) is a wholly owned subsidiary of Union Pacific Corporation (UPC). There are no other wholly owned subsidiaries of Union Pacific Corporation (UPC).

Subsidiaries of Petitioner Missouri Pacific Railroad Company (MPRR) that are not wholly owned by that corporation are as follows:

Arkansas & Memphis Railway Bridge and Terminal Co.
Brownsville & Matamoros Bridge Company
Houston Belt & Terminal Railway Company
Kansas City Terminal Railway
Southern Illinois and Missouri Bridge Co.
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
The Alton & Southern Railway Company
The Belt Railway Company of Chicago
TTX Company

Wichita Union Terminal Railway Company

Subsidiaries of Petitioner Union Pacific Railroad Company (UPRR) that are not wholly owned by that corporation are as follows:

Alameda Belt Line
Automated Monitoring & Control International, Inc.
Camas Prairie Railroad Co.
Central California Traction Co.
Iowa Transfor Railway Company
Kansas City Terminal Railway Co.
Longview Switching Co.
MT Properties, Inc.
Oakland Terminal Railway
Peoria and Pekin Union Railroad Company
Portland Terminal Railway Company
Portland Traction Company
St. Joseph & Grand Island Railway Co.
St. Joseph Terminal Railroad Company
The Denver Union Terminal Railway Co.
The Ogden Union Railway & Depot Co.
Transportation Data Xchange
TTX Company

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On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

Petitioner, Missouri Pacific Railroad Company, d/b/a Union Pacific Railroad Company ("Missouri Pacific") seeks a writ of certiorari to review an order of the Supreme Court of the State of Oklahoma, which denied review of an opinion and order of the Court of Appeals of the State of Oklahoma.

OPINIONS BELOW

The October 16, 1996, unpublished order of the Supreme Court of the State of Oklahoma is reprinted at Appendix A.[1] The July 16, 1996, unpublished opinion of the Court of Appeals of the State of Oklahoma is reprinted at App. B.

JURISDICTION

The trial court entered judgment on the jury verdict on November 21, 1994. The Court of Appeals for the State of Oklahoma ("Oklahoma Court of Appeals") affirmed the trial court's judgment on July 16, 1996. App. B. The Supreme Court of the State of Oklahoma ("Oklahoma Supreme Court") issued its order denying certiorari on October 16, 1996. App. A. Justices Ralph B. Hodges, Robert E. Lavender, and Marian P. Opala voted to grant certiorari. This Petition for a Writ of Certiorari is being docketed in this Court within ninety days from the entry of the order denying discretionary review by the Oklahoma Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (1993).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL REGULATIONS INVOLVED

*The United States Constitution states in Article VI, Clause 2:

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[1]References to documents reprinted in an Appendix will hereinafter appear in the Petition as "App."

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land;

*Section 101 of the Federal Railroad Safety Act, formerly at 45 U.S.C. § 421 and now at 49 U.S.C. § 20101, provides as amended:

> The purpose of this chapter is to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents.

*Section 205 of the Federal Railroad Safety Act, formerly at 45 U.S.C. § 434 and now at 49 U.S.C. § 20106, provides as amended:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law regulation, or order-
>
> > (1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

*Section 205 of the Federal Railroad Safety Act, formerly at 45 U.S.C. § 434 provided as follows:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

*Section 213.9(a) of the Code of Federal Regulations provides as follows:

(a) Except as provided in paragraphs (b) and (c) of this section and §§ 213.57(b), 213.59(a), 213.113(a), and 213.137(b) and (c), the following maximum allowable operating speeds apply:

[In miles per hour]

Over track that meets all of the requirements prescribed in this part for -	**The maximum allowable operating speed for freight trains is -**	**The maximum allowable operating speed for passenger trains is -**
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	110	110

*ORDINANCE NO. 1973-2-2: SECTION 1 OF FORT GIBSON, OKLAHOMA provides as follows:

It is unlawful for any person, firm, or corporation to operate, drive or propel, or cause to be operated, driven or propelled any railway engine for a greater speed than forty (40) miles per hour when entering an intersecting street or avenue within the incorporated

limits of the town of Fort Gibson, Muskogee County, Oklahoma.

STATEMENT OF THE CASE

This case raises an issue of federal preemption. The question presented is: does the Federal Railroad Safety Act preempt all municipal ordinances which purport to govern the speed of trains through towns and cities in the United States? That question arises on the following facts.

On January 11, 1991, at approximately 11:10 p.m., a Missouri Pacific train collided with a pick-up truck at the Walnut Street crossing in Fort Gibson, Oklahoma. The truck was loaded with five teen-agers who were crammed in the front cab and three teen-agers in the covered pick-up bed. Jeremy Johnson, the driver, and five of the passengers were killed.

The testimony of two witnesses indicated that Jeremy Johnson had driven up to a crossing where the lights were flashing and the gates were coming down, turned on a parallel road and accelerated at a high rate of speed toward the Walnut Street crossing in an obvious attempt to beat the train. The two surviving passengers denied this version of the accident. The Fort Gibson teen-agers were familiar with the characteristics of this railroad crossing. Walnut Street crossing is protected by standard crossbucks, advanced warning signs and pavement markings.

Prior to this accident, there had been only one previous automobile/train accident in the city's history. It happened at the

Walnut Street crossing in 1972, almost 20 years earlier. In 1973 (allegedly as a result of the 1972 automobile/train accident), ***Fort Gibson passed a city ordinance restricting train speed through town to 40 mph.***

At the time of the Johnson accident, the railroad tracks in Fort Gibson had a Class IV Federal Railroad Administration (FRA) classification. ***Under FRA rules***, promulgated pursuant to the Federal Railroad Safety Act of 1970 (the FRSA), formerly 45 U.S.C. §§ 421-447 (1986), now recodified at 49 U.S.C. §§ 20101-26102 (1994), ***the maximum speed for freight trains on Class IV track is 60 mph***. 49 C.F.R. § 213.9. The Missouri Pacific train was traveling at 48-50 mph at the time of the collision.

Jeremy Johnson's parents brought a wrongful death lawsuit, suing Missouri Pacific and the train's engineer. In June of 1993, Missouri Pacific filed its motion for partial summary judgment on several issues including the issue present before this Court.[2] Missouri Pacific argued that train speed is regulated pursuant to the Federal Railroad Safety Act, therefore, local or municipal train speed regulations are preempted by the federal speed regulations. On July 1, 1993, after oral arguments on Missouri Pacific's motion for partial summary judgment regarding federal preemption, the trial court denied the motion.[3] On August 17, 1993, Missouri Pacific filed its

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[2]Missouri Pacific's motion for partial summary judgment is designated as Index No. 94, pp. 504-565, to the Record on Appeal filed with the Oklahoma Court of Appeals.

[3]The order denying the motion for summary judgment was filed with the trial court on July 29, 1993. The order is designated as Index No. 148, pp. 1081-1082.

motion in limine regarding local ordinances pertaining to train speed, and its motion in limine regarding the allegedly excessive train speed or the alleged duty of the railroad to reduce train speed for this crossing. Both of these motions asserted federal preemption and the Federal Railroad Safety Act.[4] On September 12, 1994, immediately prior to voir dire, the motions were denied by the trial court in open court.[5]

The trial court allowed the Respondents to introduce a copy of the city ordinance into evidence, over the railroad's objection, and to build most of their case around the theory that "six young people died as a result of a train speeding through the town of Fort Gibson in violation of the law...". The theory that the train was not merely speeding, but *wantonly* speeding, *permeated* the trial.

The jury found *no* liability on the part of the engineer, and found Jeremy Johnson to have been *equally at fault* with Missouri Pacific. The jury returned a verdict against Missouri Pacific for $1 million in actual damages and $3 million in punitive damages. Judgment on the jury verdict was entered on November 21, 1994.[6]

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[4]The motions in limine are, respectively, designated as Index No. 187, pp. 1343-1366, and Index No. 189, pp. 1388-1409, to the Record on Appeal filed with the Oklahoma Court of Appeals.

[5]The trial court's oral denial of the motions regarding federal preemption can be found at Transcript, Volume I, pp. 89-91. Hereinafter, all references to the transcript will be denoted by volume and page number only. For example: v. I, p. 1.

[6]The judgment is designated as Index No. 331, pp. 3401-3405 to the Record on Appeal to the Oklahoma Court of Appeals.

Missouri Pacific appealed to the Oklahoma Supreme Court, requesting that court to vacate the trial court's judgment and remand this action for further proceedings consistent with Oklahoma and federal law. On August 30, 1995, Missouri Pacific filed its Brief in Chief with the Supreme Court of the State of Oklahoma, raising and arguing the federal question of preemption in the following propositions:

I. The Trial Court Erred In Allowing The Jury To Consider Train Speed Issues, Which Are Preempted By Federal Law.

   A. Train speed issues are preempted by federal law.

   B. The State of Oklahoma has not adopted a more stringent law, regulation or order regarding train speed.

   C. The trial court erroneously submitted Jury Instructions 24 (negligence *per se*), 25 and 26 regarding the municipal train speed ordinance over defense counsel' objections. Apps. C, D, and E, respectively.

II. The Trial Court Erred In Admitting Evidence Of Circumstances Surrounding The Passage Of the Local Speed Ordinance And In Giving Jury Instruction No. 28. App. F.

   A. Even in absence of preemption, admission of such evidence was error, because

circumstances surrounding passage of the local speed ordinance were irrelevant.

B. The trial court erred in giving Jury Instruction No. 28 (regarding the city ordinance).

The appeal was subsequently assigned to the Oklahoma Court of Appeals. The Oklahoma Court of Appeals affirmed the trial court, avoiding the issue of federal preemption. App. B. Missouri Pacific raised the federal preemption issue in its Petition for Writ of Certiorari and subsequent Reply to the Oklahoma Supreme Court. Apps. G and H. The Oklahoma Supreme Court, without opinion, denied Missouri Pacific's Petition on October 16, 1996. App. A.

REASONS FOR GRANTING THE WRIT

Summary of Argument

Missouri Pacific operates interstate trains that cross Fort Gibson's streets. It is undisputed that the federal speed limit through Fort Gibson is sixty (60) miles per hour (Class IV track). The City of Fort Gibson passed an ordinance prohibiting train speeds in excess of forty (40) miles per hour. The ordinance is expressly preempted by the FRSA. Municipal regulation of train speed is also a violation of the Supremacy Clause of the United States Constitution. The Oklahoma decision creates a conflict between federal and state law, will unreasonably burden interstate commerce, and will allow the Oklahoma trial courts to ignore the Supremacy Clause and impose a myriad of municipal train speed regulations on interstate trains. The harmful impact of such an opinion requires the granting of Missouri Pacific's Petition for Writ of Certiorari.

I. THE FEDERAL RAILROAD SAFETY ACT PREEMPTS ALL CITY ORDINANCES PURPORTING TO REGULATE TRAIN SPEED.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. The Supreme Court summarized the instances in which federal law preempts other legislation under this authority:

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. *Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law,* when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, *where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law,* or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986) (emphasis added). "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *CSX*

Transp., Inc. v. City of Plymouth, Mich., 86 F.3d 626, 627, 628 (6th Cir. 1996) (quoting *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 369, 106 S.Ct. 1890, 1899, 90 L.Ed.2d 369 (1986)).

A. Congress Expressed A Clear Intent to Preempt State and Local Law.

In 1970, in response to concern about grade crossing safety, the United States Congress enacted the Federal Railroad Safety Act (the "FRSA"), formerly 45 U.S.C. §§ 421-447 (1986), now recodified at 49 U.S.C. §§ 20101-26102 (1994). The FRSA *EXPRESSLY* preempts state and local regulation of train speeds. The Act begins with directions to the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103 (formerly 45 U.S.C. § 431). 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434), the provides, as amended, the following:

> Laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, rule, regulation, order or standard, related to railroad safety until such time as the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. 49 U.S.C. § 20106.

Whether State regulation is preempted is a question of Congressional intent, with Congressional purpose being the "ultimate touchstone" of the inquiry. *See Allis-Chalmers Corp. V. Lueck*, 471

U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). In enacting the FRSA, Congress sought to promote rail safety by establishing nationally uniform rail safety standards. In doing so, Congress "define(d) explicitly" its intent to preempt State regulation of any aspect of rail safety which the Secretary has regulated. *See Armijo v. Atchison, Topeka & Santa Fee R..R.. Co.*, 19 F.3d. 547 (10th Cir. 1994). The FRSA's preemptive effect is clearly established by the terms of the Act itself, by its purpose as expressed in legislative history, and by uniform case law interpreting its provisions.

Legislative history reveals "that the issue of federal preemption was vigorously debated, leaving a clear record of Congressional intent for virtually complete federal preemption in the area of railroad safety laws." *CSX Trans., Inc. v. Public Util. Comm'n,* 701 F.Supp. 608, 613 (S.D. Ohio 1988), *aff'd,* 901 F.2d 497 (6th Cir. 1990). As two congressmen noted, preemption was the central feature of the FRSA. Hearings before the House Subcommittee on Transportation and Aeronautics, May 17-23, 1970, U.S. Government Printing Office 43, 114 (remarks of Reps. Springer and Kuykendall). The clear and manifest purpose of Congress was to proscribe State regulation of railway safety.

Congress expressly intended that the FRSA preempt all railroad safety legislation except *state law* governing an area in which the Secretary of Transportation has not issued a regulation or order or *state law* more strict than federal regulations when necessary to address *unique* local problems. 49 U.S.C. § 20106. A *state* may adopt or continue in force an additional or more stringent law, regulation or order related to railroad safety so long as the law, regulation or order: (1) is necessary to eliminate or reduce essentially

local safety hazards; (2) is not incompatible with a law, regulation, or order of the United States government; and (3) does not unreasonably burden interstate commerce. 49 U.S.C. § 20106. These exceptions apply only to a "*State* ... law, regulation, or order ..." 49 U.S.C. § 20106 (emphasis added). Only when a state law meets all three requirements set forth in § 20106 does preemption not occur. *SeeWright v. Illinois Central R.R. Co.*, 868 F. Supp. 183 (S.D.Miss. 1994); *Smith v. Norfolk & Western Ry. Co.*, 776 F. Supp. 1335 (N.D.Ind. 1991).

Congress' intent to preempt is also strongly supported by the 1994 Congressional reenactment of the FRSA. The legislative history of the reenactment expressly states that Congress intended no substantive change in the law to result from the FRSA's reenactment. *See* H.R. No. 180, 103d Cong., 2d Sess. 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818. Prior to this reenactment, interpretive case law uniformly held that the FRSA did not provide for municipal regulation of train speed. *See Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir. 1973); *Landrum v. Norfolk Southern Corp.*, 836 F.Supp. 373 (S.D. Miss. 1993); *CSX Trans., Inc. v. City of Thorsby*, 741 F.Supp. 889 (N.D.Ala. 1990); *Grand Trunk Western RR. Co. v. City of Merrillville*, 738 F.Supp. 1205 (N.D.Ind. 1989); *CSX Trans., Inc. v. City of Tullahoma*, 705 F.Supp. 385 (E.D.Tenn. 1988); *and Southern Pacific Trans. Co. v. Town of Baldwin*, 685 F.Supp. 601 (W.D.La. 1987). The reenactment doctrine provides that where legislation is uniformly construed by the courts, Congress, being presumed to know interpretive case law, adopts the court's interpretation at the time of reenacting legislation without substantive change. *See Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 870, 55 L.Ed.2d 40 (1978). Under the reenactment doctrine, Congress

has signified its agreement with interpretative case law concerning this issue.

Whether the State of Oklahoma "could have" adopted a more stringent law, regulation or order is *not* an issue in this case. Oklahoma has *not* attempted to do so, and therefore, the exceptions allowed under 49 U.S.C. § 20106 need not be addressed. (The FRSA does not include ***any*** exceptions for cities or other local governments.)

B. Congress Has Covered the Subject Matter of Train Speed Regulation and, thus, State and Local Governments Can Not Supplement Federal Law.

The Supremacy Clause of Art. VII of the Constitution provides Congress with the power to preempt state law, and pursuant to the that Clause, preemption occurs "... where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law...". *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986). In § 20106 of the FRSA, Congress manifested its unwillingness to provide the States any role in regulating train speed for the reason that subjecting the railroads to enforcement from a number of state and judicial administrative systems could well result in a burden on interstate commerce. H.R. Rep. No. 1194, 91st Cong., 2d Sess. 11, 19 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

In *CSX Transportation v. Easterwood,* 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d. 387 (1993), this Court held that the

Secretary of Transportation's adoption of the regulations in § 20106 should be understood as covering the matter of train speed [thus precluding common law excessive speed claims]. This Court explained that:

> [R]elated safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account. *Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort which respondent seeks to impose on petitioner.*
>
> ***
>
> Read against this background, [49 C.F.R.] Section 213.9 (a) should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings. Respondent nevertheless maintains that preemption is inappropriate because the Secretary's primary purpose in enacting the speed limits was not to ensure safety at grade crossings, but rather to prevent derailments. *Section 434 does not, however, call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted which in fact cover the subject matter of train speed....We thus conclude that respondent's excessive speed claim cannot stand in light of the Secretary's adoption of the regulations in § 213.9.*

Id. At 1742-43 (emphasis added).

Easterwood holds that a state-law claim for excessive train speed is preempted by the FRSA and cannot be maintained if the train was operating within the federally-mandated speed limit. *Easterwood* also makes clear that preemption is mandated regardless of the reason for the adoption of the Secretary's regulation (*e.g. to* prevent derailment). To hold otherwise would open the issue of train speed to *ad hoc* determinations that completely undermine the FRSA.

II. THE OKLAHOMA OPINION CREATES A CONFLICT BETWEEN STATE AND FEDERAL LAW, AND ALLOWS OKLAHOMA MUNICIPALITIES TO BE EXEMPT FROM PROVISIONS OF THE FEDERAL RAILROAD SAFETY ACT.

A. The Oklahoma Decision Is In Conflict With Federal Law.

The Oklahoma Courts' decision is in conflict with the provisions of the FRSA and this Court's decision in *Easterwood*, as well as every other federal court decision which addresses the authority of municipalities to regulate train speed. *See, e.g., Eldridge v. Missouri Pac. R.R. Co.,* 832 F.Supp. 328 (E.D. Okla. 1993); *Wright v. Illinois Cent. R.R. Co.,* 868 F.Supp. 183 (S.D. Miss. 1994); *Armstrong v. Atchison, Topeka & Santa Fe Ry. Co.,* 844 F. Supp. 1152 (W.D. Tex. 1994). Federal courts uniformly hold that if the speed of a train complies with the federal regulations, any common

law claim that the train was traveling in excess of a safe rate of speed is preempted by the FRSA. *See, e.g., Bowman v. Norfolk Southern Ry. Co.*, 832 F.Supp. 1014 (D. S.C. 1993); *Watson v. Rail Link, Inc.*, 826 F.Supp. 487 (S.D. Ga. 1993).

Even if the City of Fort Gibson's ordinance had been promulgated under the express state constitutional authority (which it was not), it still would be preempted by the provisions of the FRSA. *City of Covington v. Chesapeake & Ohio Ry.*, 708 F.Supp. 806, 808-809 (E.D.Ky. 1989); *CSX Transp., Inc. v. City of Thorsby*, 741 F.Supp. 889, 891 (M.D,Ala. 1990); and *CSX Trans., v. City of Plymouth, Mich.*, 86 F.3d 626 (6th Cir. 1996) (dealing with a crossing blocking ordinance).

The Oklahoma courts have failed to articulate any justification for excepting Oklahoma municipalities from the provisions of the FRSA. That conflict is especially troubling in light of the Federal Railroad Safety Act's mandate for establishing nationally uniform law for railroad safety. 49 U.S.C. § 20106) (as amended, this section formerly at 45 U.S.C. § 434).

B. The Oklahoma Decision Allows Oklahoma Trial Courts to Unconstitutionally Require Trains in Oklahoma to Abide By Myriad Local Train Speed Ordinances.

Federal courts have uniformly held that municipal ordinances purporting to limit the speed of trains passing through city limits are preempted by the FRSA, and thus void under the Supremacy Clause.

> The plain language of [45 U.S.C. § 434, now 49 U.S.C. § 20106] indicates that only a *state* may adopt a more stringent railway safety law in response to a local safety hazard. Congress is presumed to use words in their ordinary sense unless it expressly indicates the contrary. Since municipalities are not included in this preemption exception, municipalities are preempted from passing more stringent train speed limits than those set out in 49 C.F.R. Sec. 213. *In short ... municipal speed limits are preempted under the supremacy clause of the U.S. Art. VI, Cl. II.*

Chesapeake & Ohio Ry. Co. v. City of Bridgman, 669 F.Supp. 823, 826 (W.D.Mich. 1987) (citations omitted) (emphasis added). Federal courts have also uniformly held that any *state* statute which purports to delegate power to the cities to regulate train speed is unconstitutional by virtue of the Supremacy Clause. *City of Bridgman,* 669 F.Supp at 826; *Consolidated Rail Corp. v. Smith,* 664 F.Supp. 1228, 1230 (N.D.Ind. 1987); *City of Covington v. Chesapeake & Ohio Ry.Co.,* 708 F.Supp. 806, 808 (E.D.Ky. 1989).

The reasons why municipalities cannot regulate train speed were well stated in *Consolidated Rail Corp. v. Smith,* 664 F.Supp. 1228 (N.D.Ind. 1987), where the court explained:

> [Allowing municipalities to regulate train speed] utterly would defeat Congress' purpose in enacting the FRSA - enhancement of railroad safety by making railroad regulation uniform. Congress was concerned that the existence of fifty separate regulatory systems

> in the fifty states would undermine safety. If so, separate regulation by every city, village, township, or hamlet along the mainline would undermine safety infinitely more. Separate municipal regulation of speed is so greatly at odds with the Congressional purpose of uniformity as to need no further argument.

Id. at 1238.

Additionally, in Section 20106 (formerly § 434), Congress manifested its unwillingness to provide the States any broader role in the regulation of railroads because it did not believe that "safety in the nation's railroads would be advance sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." H.R. Rep. No. 1194, 91st Cong., 2d Sess. 11, 19 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109. The intent to establish a national uniform body of regulation flowed from a legislative recognition that the rail industry is a national, not ***local***, transportation system:

> [T]he railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character ***calling for a uniform body of regulations*** and enforcement ... ***To subject a carrier to enforcement before a number of different state and administrative judicial systems in several areas of operation could well result in an undue burden on interstate commerce.***

Id. at 4110-11(emphasis added). Obviously, allowance of control of train speed by thousands of separate local municipalities would violate this clearly-stated Congressional intent. Allowing municipalities to burden interstate commerce and jeopardize safety by subjecting interstate trains to a variety of speed restrictions is what Congress and the resulting federal courts have worked to avoid.

CONCLUSION

The Petition for Writ of Certiorari should be granted. Does the Federal Railroad Safety Act govern the speed of a train through a city, and, therefore, preempt all municipal ordinances and resulting claims based on excessive speed? The public and the railroad industry need a definitive answer from this Court.

Respectfully submitted,

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January 10, 1997